INITIAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Amend Section 6388
Pertaining to Disclosure of Mill Assessment Reporting

This is the Initial Statement of Reasons required by Government Code (GC) section 11346.2 and the public report specified in section 6110 of Title 3, California Code of Regulations (CCR). Section 6110 meets the requirements of Title 14 CCR section 15252 and Public Resources Code section 21080.5 pertaining to certified state regulatory programs under the California Environmental Quality Act.

SUMMARY OF PROPOSED ACTION/PESTICIDE REGULATORY PROGRAM ACTIVITIES AFFECTED

The Department of Pesticide Regulation (DPR) proposes to amend Title 3 CCR section 6388(d). The pesticide regulatory program activities that will be affected by the proposal are those pertaining to the disclosure of the pesticide mill assessment reports of pesticide registrants required by this regulation. Currently, the regulation states that whenever three or fewer registrants report sales of a pesticide product containing the same active ingredient, such reports will be considered trade secrets and will not be disclosed by DPR. The proposed action would delete this language of the provision to conform with current California law under the Public Records Act, GC Code section 6250 et seq.

SPECIFIC PURPOSE AND FACTUAL BASIS

The predecessor of section 6388 was section 2433.1, which was first adopted in December 1979. It required that each pesticide registrant report annually the total pounds of active ingredients in pesticide products sold for use in the state for mill assessment purposes. It included a provision that stated that whenever three or fewer registrants reported sales of a single active ingredient, such reports would be considered "trade secrets" and would not be disclosed by the Department. In 1991, section 6388 was amended to require registrants to report quarterly total dollars of sales and total pounds or gallons of each registered and labeled pesticide product to facilitate auditing and accuracy of reporting, and bring the reporting requirements in line with the mill assessment provisions of Division 7, Article 4.5 of the Food and Agricultural Code, commencing with section 12841. The amendment also added subsection (b) that itemized exactly what information such report form must include. The disclosure limitation language remained unchanged.

The designation of the mill assessment reports of registrants in situations where there are three or fewer registrants reporting sales of products containing a single active ingredient as "trade secrets" is invalid and inconsistent with existing California law, specifically with the requirements of the Public Records Act (GC section 6250 et seq.).

The definition of a "trade secret" generally relates to the production of goods or to other operations in a business entity. This generally accepted concept of a trade secret is reflected in section 6245.7 of the Public Records Act that defines the term for purposes of the disclosure of public records related to air pollution control and monitoring as "any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern *who are using it to fabricate, produce, or compound an article of trade or a service having commercial value* and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it" (emphasis added). The Uniform Trade Secrets Act, Civil Code section 3426 et seq., echoes this commonly understood meaning by defining a trade secret as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (1) *derives independent economic value, actual, or potential, from not being generally known to the public* . . .(emphasis added).

The information contained in the reports required under Title 3 CCR section 6388 consisting of the aggregated quarterly sales by dollar and volume of registered pesticide products in no way relates to the production process of a product or provision of a service, and has no independent economic value. While disclosure of these reports would provide information on the relative market position of the top three sellers of pesticide products containing a particular active ingredient, such information is not a trade secret. It has no "independent economic value," as that term is understood and defined by the courts when determining trade secret status. It is market information that may, along with information from other sources, be used by registrants in their decisionmaking process. The common reason cited to justify this nondisclosure in past rulemaking packages is that it was necessary to "prevent competitors from obtaining an unfair competitive advantage." This information gives no one an unfair competitive advantage. All competitors would have equal access to the information.

In fact, the nondisclosure language of subsection 6388(d) creates the anomalous situation of protecting the "trade secrets" (presumably in the reports) of some registrants (where there are three or fewer whose products contain the same active ingredient) but not the "trade secrets" of other registrants. Such an artificial designation contravenes the intent of the Public Records Act. The nondisclosure of public records that do not fall under a specific exemption of the Public Records Act must be justified under GC section 6255, which requires a determination that the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. There is no public interest served by the nondisclosure of these reports.

Even if the information contained in the reports submitted by some registrants pursuant to Title 3 CCR section 6388 could be arbitrarily designated a "trade secret," the Public Records Act requires their production as a public record unless DPR could make the determination described above under GC section 6255 in favor of nondisclosure. Therefore, the proposed amendment is intended to bring the regulation into compliance with California law.

Additionally, since the creation of the California Environmental Protection Agency, there has, at times, been confusion in the regulated community over whether reference to "EPA" in DPR's regulations refers to the U.S. Environmental Protection Agency or the California Environmental Protection Agency. In order to clarify which agency is being referenced, DPR proposes to replace all references to the previous acronym for U.S. Environmental Protection Agency--"EPA," with the acronym "U.S. EPA."

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION (GOVERNMENT CODE SECTION 11346.2 (b)

DPR has not identified any feasible alternatives to the proposed regulatory action that would lessen any possible adverse economic impacts, including any impacts on small businesses, and invites the submission of suggested alternatives.

As discussed in the Notice of Proposed Regulatory Action, published in the *California Regulatory Notice Register*, DPR has determined that the adoption of this regulation will not have a significant cost impact on private persons or businesses.

IDENTIFICATION OF ANY SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECT THAT CAN REASONABLY BE EXPECTED TO OCCUR FROM IMPLEMENTING THIS PROPOSAL

DPR can identify no adverse environmental effects from the proposed amendment.

EFFORTS TO AVOID UNNECESSARY DUPLICATION WITH FEDERAL REGULATIONS

The proposed regulatory action does not duplicate or conflict with the Code of Federal Regulations.

DOCUMENTS RELIED UPON

There are no documents upon which DPR is relying in proposing this amendment other than the provisions of California law, particularly the California Public Records Act (GC section 6250 et seq.).